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Calendar No. 498

99TH CONGRESS
2d Session

SENATE

REPORT
99-231

ORIGINAL

RELIEF FOR CERTAIN DESERT LAND ENTRYMEN IN IDAHO

JANUARY 27, 1986.—Ordered to be printed

Mr. MCCLURE, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 595]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 595) to provide relief for certain desert land entrymen in Idaho, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE MEASURE

S. 595 would reinstate 12 desert land entries on certain lands in Idaho specified in the bill and would allow the entrymen 6 months from the date of enactment to rescind any agreements that are prohibited by the Secretary. The named entrymen or their heirs or devisees would be allowed to resubmit final proof of reclamation and cultivation of the land until December 31, 1988, in accordance with provisions of the Desert Land Act. Upon making final proof, entrymen named would receive patents without further payments. Such patents would be inheritable but not assignable and may be mortgaged for certain purposes under regulation.

BACKGROUND AND NEED

The project affected by S. 595 is located near the Snake River in Elmore County, ID. The Sailor Creek project consists of 12 desert land entries comprising approximately 3,790 acres of land. The project was initiated in 1963. Under the Desert Land Act (43 U.S.C. 321-339) these individuals filed for entry to 320 acre parcels of land. Applications for all of the entries were approved in 1964 and final proof of reclamation and final payments to the United States were made for Sailor Creek in 1964. Subsequently, these entries

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were invalidated as a result of actions taken by the Department of the Interior.

The Sailor Creek entries were farmed under 2-year leases, with two, 5-year renewal options (one entry was leased originally only for 1964), following cancellation of 10-year operating agreements that had been made in reliance of the Bureau of Land Management [BLM] Director's 1964 decision in the *Indian Hills* case. At that time, the Department had no regulations concerning leases or farming contracts for desert land entries. However, it did have a regulation expressly authorizing mortgages on desert entries.

Decisions of the Department made between 1891 and 1910, and still in effect in 1964, stated that desert entrymen did not have to live on the land, that all the required work could be done by an agent and did not have to be done by the entryman, and that other parties could assist in financing the work so long as there was no agreement to transfer title to the person providing the financing. Accordingly, the farm operators received mortgages to secure payment of the development costs.

In May 1966, for Sailor Creek, almost 2 years after final payment was made, the BLM filed contest complaints against the entrymen on grounds that they had violated the 320-acre holding limitation of the Desert Land Act (43 U.S.C. 321 at 329). In the *Sailor Creek* case, the administrative law judge who heard testimony ruled in favor of the entrymen. However, that decision was overruled by the Interior Board of Land Appeals [IBLA] on the basis of its own interpretation of section 329. In a suit for judicial review, the U.S. district court held that, while the Department's interpretation of the act was a proper one, it was unfair for the IBLA to apply that interpretation retroactively to the entries and that the entrymen should have been given an opportunity to comply with the new interpretation. The Court of Appeals for the Ninth Circuit reversed the district court and interpreted section 329 as permitting no latitude for modifying contractual arrangements to comply with the new interpretations. A second appeal was decided against the entrymen and the U.S. Supreme Court denied certiorari.

LEGISLATIVE HISTORY

S. 595 was introduced on March 6, 1985, by Senator McClure. No hearings were held on this bill in this Congress. A hearing on S. 482, a measure which contained similar provisions was held on June 23, 1983, last Congress. The administration opposed S. 482 and also opposes S. 595. The committee favorably reported S. 482 without amendment on August 4, 1983, by a majority vote.

At a business meeting on November 6, 1985, the Senate Committee on Energy and Natural Resources ordered S. 595 favorably reported.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on November 6, 1985, by majority vote of a quorum present recommends that the Senate pass S. 595, as described herein.

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The rollcall vote on reporting the measure was 15 yeas, 2 nays as follows:

YEAS	NAYS
Mr. McClure	Mr. Metzenbaum
Mr. Hatfield [1]	Mr. Bradley
Mr. Weicker [1]	
Mr. Domenici [1]	
Mr. Wallop	
Mr. Warner	
Mr. Murkowski [1]	
Mr. Nickles	
Mr. Hecht	
Mr. Evans	
Mr. Johnston	
Mr. Bumpers [1]	
Mr. Ford	
Mr. Bingaman [1]	
Mr. Rockefeller [1]	

SECTION-BY-SECTION ANALYSIS

Section 1 contains five congressional findings regarding the cancellation of certain entries under the Desert Land Act of March 3, 1877, of a farming project known as Sailor Creek in Idaho.

Section 2 lists the names, heirs or devisees of the entrymen to which the provisions of S. 595 would apply.

Section 3 would reinstate 12 desert land entries specified in the bill and would allow the entrymen, or their heirs or devisees of any deceased entryman within 6 months from the effective date of enactment of S. 595 to rescind any agreements to which they might be a party that are prohibited by the Secretary's interpretation of 43 U.S.C. 329. These individuals would also be allowed until December 31, 1988, to resubmit final proof of reclamation and cultivation of the land in accordance with the Desert Land Act. Section 3 also provides for the issuance of patents upon showing final proof.

Section 4 defines the nature of the property right prior to the issuance of a patent as a personal right, inheritable but not assignable. Entries may be mortgaged for specific purposes.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 8, 1985.

Hon. JAMES A. MCCLURE,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 595, a bill to provide relief to certain desert land entry-

[1] Indicates voted by proxy.

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men in Idaho, as ordered reported by the Senate Committee on Energy and Natural Resources, November 6, 1985.

This bill reinstates 12 desert land entries and allows time for the specified parties to comply with the Desert Land Entry Act in order to become eligible for patents on the affected lands. If S. 595 is not enacted, we expect that the land in question would be offered for sale by the Federal Government and that trespass fees would be charged against the entrymen. Enactment of this bill would preclude both the sale of the land and collection of the trespass charges. Assuming that all of the affected lands would have been sold, and that all trespass charges would have been collected in the absence of this bill, CBO estimates, based on information from the Bureau of Land Management, that a total of approximately $1.4 million in receipts will be lost by the Federal Government as a result of enactment of S. 595. If some of the lands could not be sold or some of the trespass charges not collected, the loss of receipts would be less.

Enactment of this bill would not affect the budgets of State and local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 595. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 595 as reported.

EXECUTIVE COMMUNICATIONS

The pertinent legislative reports received by the committee from the Department of the Interior setting forth executive agency recommendations relating to S. 595 are set forth below:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, October 31, 1985.

Hon. JAMES A. MCCLURE,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This responds to your request for our views on S. 595, a bill "To provide relief for certain desert land entrymen in Idaho."

We oppose enactment of S. 595.

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S. 595 contains six Congressional findings regarding the Sailor Creek farming project which is developed under the provisions of the Desert Land Act of March 3, 1877, as amended (43 U.S.C. 321, *et seq.*).

This legislation would reinstate 12 specified desert land entries and would allow the entrymen, or their heirs or assigns, within six months from effective date of S. 595, to rescind any agreements to which they might now be a party that are prohibited by Department of the Interior regulations issued pursuant to section 7 of the Desert Land Act (43 U.S.C. 329). Those individuals would also be allowed until December 31, 1988, to resubmit final proof of reclamation and cultivation of the land in accordance with the applicable provisions of the Desert Land Act. The bill requires that upon making final proof, patents would be issued to the named parties without further payment.

In addition, S. 595 specifies that prior to issuance of a patent, the property right to the lands of any person named in the bill whose entry is reinstated shall be a personal right, inheritable but not assignable. However, such entries could be mortgaged to secure repayment of funds borrowed for development of the entry or for farm operation or crop production expenses.

The Desert Land Act allows a person to enter no more than 320 acres of desert land to reclaim it. The Act provides that an entry may not be assigned to or for the benefit of any corporation or association, and that no person or association other than the entryman may, prior to issuance of the patent, hold, by assignment or otherwise, more than 320 acres. The Act also specifies that entries violating the Act shall be cancelled and the lands and money invested shall be forfeited.

In the Sailor Creek case, twelve individuals filed declarations in 1963 under the Desert Land Act upon contiguous 320-acre parcels comprising approximately 3,790 acres of undeveloped desert land adjacent to the Snake River in Elmore County, Idaho. Through various contractual arrangements they allowed a single entity to possess, control and enjoy substantially all the benefits of the desert land entries.

The declarants had previously obtained water permits from the State of Idaho. They assigned these water permits to the Sailor Creek Land and Water Company, which then assigned the rights to the Sailor Creek Water Co.

Thereafter, the entrymen made lease and contractual commitments to Sailor Creek Water Co. (Sailor Creek), the source of their financing, under which Sailor Creek would advance the capital necessary to bring water to the lands. Sailor Creek advanced the money as loans to the entrymen, who in turn agreed to pay for irrigation water and mortgaged their interests in the entries to secure the future contract payments. Eleven of the entrymen also leased their entries to the twelfth entryman, who in turn caused all twelve entries to be leased to Sailor Creek. The entrymen remained responsible for the payment of taxes on the land, but all costs of planting, together with all decisions regarding the selection, growing and harvesting of crops, were the responsibility of Sailor Creek. The lessees retained all revenue generated from the farming operation but were obligated to pay the lessors an annual rental. Sailor

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Creek thereby became both the mortgagee of the anticipated title and the lessee/developer of the possessory interests in the lands. The entrymen filed final proof papers in 1964.

In 1966, after becoming aware of the totality of the arrangement between the entrymen and Sailor Creek, the Bureau of Land Management (BLM) filed contests before the Interior Board of Land Appeals (IBLA) against the entries alleging that the prohibition in the Desert Land Act against holdings exceeding 320 acres had been violated, and seeking cancellation and forfeiture of the entries. In 1978, the United States Court of Appeals for the Ninth Circuit affirmed the previous findings of the IBLA that Sailor Creek's possessory and legal interest under the lease-mortgage agreements constituted a "holding of the desert land by assignment or otherwise" that was prohibited by the Desert Land Act. The Court also found that the Government was not estopped from cancelling the entries, because "having failed to inform the Government of the totality of their arrangement, appellees cannot be heard to argue that the Government's failure to warn them of their illegality supports the invocation of estoppel." The entrymen's petition to the United States Supreme Court for a writ of certiorari to the Ninth Circuit Court of Appeals was denied on November 29, 1982.

In their presentations before both IBLA and the courts, the entrymen placed considerable weight on two factors in arguing that the Government should be estopped from cancelling the entries. They first argued that the cancellation of their entries resulted from the retroactive application of a new interpretation of the term "holding" and second, that since Government officials were aware of, but did not advise, the entrymen of the illegality of the lease arrangements, the Government should have been estopped from cancelling the entries.

The Court solidly rejected both arguments. As to the retroactive application of the interpretation of the term "holding," the IBLA found, and the Ninth Circuit agreed, that the Government cannot be estopped from attacking illegality. The fact is that the arrangements were illegal and that the Desert Land Act authorizes the Secretary to contest desert entries for such illegality.

As to the second argument, IBLA found in both cases that the Government officials had not been advised of all the relevant facts. The IBLA noted that "one can scarcely expect the Government to caution parties against illegal acts when such acts are not brought to the Government's attention until after their consummation."

If the Government had been fully apprised of the true intent of the parties involved in the Sailor Creek case, the farm would not have been allowed to proceed to full development. Upon learning of the real nature of the development plans, the Government proceeded with the contest action authorized by the Act. However, we are informed that, before the Government initiated these contest actions, the corporation had reclaimed the lands, spent millions of dollars to support the operation and the farm was producing crops.

The courts have found that, in taking action to cancel the entries, the BLM acted as required by the provisions of the Desert Land Act. One of the main purposes of the Act was to insure that desert land was made available to individuals for settlement, as opposed to development by large firms. As pointed out by IBLA in a

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similar situation, the *Black Mesa* case, "It is clear that Congress was concerned that land actually be available to bona fide settlers. There are two basic methods by which that Congressional will could have been thwarted. First, a large syndicate could hold desert lands in the name of dummy entrymen and eventually acquire absolute title to the lands. Second, the syndicate could hold desert lands in the name of dummy entrymen without ever receiving title, but at the same time using the land for its own benefit and preventing bona fide settlers from making entry." The amendments to the Desert Land Act in 1890 and 1891 were intended to prevent such situations from occurring. The 1890 amendment established the 320-acre limitation, while the 1891 amendment provided that one person could not hold by assignment *or otherwise*, prior to the issuance of patent, more than 320 acres of public land. Thus, the Sailor Creek situation clearly violates the Act.

In addition, the 320-acre limitation is not the only provision of the Desert Land Act that was violated in this case. For example, IBLA found that the Sailor Creek scheme constituted an "assignment for the benefit of any corporation or association," and as such was prohibited by 43 U.S.C. 324.

In summary, S. 595 would legitimize violations of the Desert Land Act, and on that basis, we oppose its enactment.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

J. STEVEN GRILES,
Deputy Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the committee notes that no changes in existing law are made by the bill, S. 595, as reported.

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